



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Bertsch Construction

**File:** B-253526

**Date:** August 25, 1993

Lee Bertsch for the protester,  
Amy J. Brown, Esq., General Services Administration, for the  
agency.  
Peter A. Iannicelli, Esq., and Michael R. Golden, Esq.,  
Office of the General Counsel, GAO, participated in the  
preparation of the decision.

### DIGEST

1. Protest that contracting agency improperly awarded lease on the basis of an offer of property that has less office space and wareyard than required by solicitation for offers (SFO) is denied where: (1) SFO specified that minimum footage requirements were only approximate, and contracting agency reasonably determined that awardee's offer met the SFO footage requirements and (2) awardee's property meets tenant agency's actual space needs and has been occupied by tenant agency for past 15 years.

2. Protest that awardee of lease inaccurately certified that no person or firm was paid a contingent fee to assist the awardee to obtain the contract and that offered building contains no asbestos is denied, where there is no evidence to support the protester's speculative allegations.

3. Protest that award of lease was improper because lease should, but does not, include any requirement that the wareyard be resurfaced is denied, where the solicitation did not contain a requirement that the wareyard be resurfaced and the present condition of the wareyard is apparently acceptable to the contracting agency.

### DECISION

Bertsch Construction protests the award of a lease to LK Properties (LK) by the General Services Administration (GSA) pursuant to solicitation for offers (SFO) No. 93-10. Bertsch alleges that: (1) the lease awarded to LK is for less office and related space and wareyard than the SFO required; (2) LK's offer contained inaccurate certifications; (3) the contract does not include any requirement to resurface the wareyard; (4) negotiations were

unbalanced; and (5) GSA's present value analysis used the rent Bertsch initially proposed rather than the lower rent quoted by Bertsch in its best and final offer (BAFO). We deny the protest.

The SFO issued on February 9, 1993, solicited offers for a 10-year lease for office, storage and warehouse space together with a wareyard in Bismarck, North Dakota. The SFO stated that the property had to be available for occupancy by the United States Geological Survey (USGS) by August 1, 1993, at which time the present lease with LK would expire.

Both Bertsch and LK submitted initial offers by the March 3 due date.<sup>1</sup> Negotiations were held with both firms. As Bertsch's offer was based upon constructing a new building, the contracting officer made numerous requests for Bertsch to provide information required by the SFO and necessary for proper evaluation of offers of new construction.<sup>2</sup> Among other things, Bertsch was requested to: (1) pick one of its four proposed sites as the basis for its offer; (2) provide evidence of financial (loan) commitments and any purchase options pertinent to the land it would buy and upon which it planned to build; (3) provide scale drawings, including cross sections, of the proposed new building; and (4) provide site plans. The contracting officer even provided Bertsch with copies of the SFO provisions with which Bertsch's offer did not comply regarding information required for new construction. Furthermore, the contracting officer told Bertsch on several occasions that it would not be awarded the contract unless it submitted the requested information, and the contracting officer reminded Bertsch that its delay in submitting the necessary documentation was using up valuable negotiation time.

Both firms submitted BAFOs by the April 14 closing date. The contracting officer and a GSA realty specialist found Bertsch's BAFO to be incomplete because it did not include such required items as evidence of control of the site, compliance with local zoning laws and a satisfactory financial commitment. The contracting officer, therefore, determined Bertsch's offer to be unacceptable, leaving LK's

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<sup>1</sup>Bertsch proposed to build a new building at any one of four different sites; LK proposed the building currently occupied by USGS.

<sup>2</sup>The record shows that the contracting officer contacted Bertsch and requested information relevant to its offer of new construction on at least eight occasions.

offer as the only acceptable offer.<sup>3</sup> Nonetheless, GSA examined both offerors' proposed rents and determined, based upon a present value analysis, that LK's offer represented the better rental rate. LK's total proposed rental was also less than the government estimate. Accordingly, the contracting officer determined that it was in the government's best interest to award the lease to LK. GSA awarded the lease to LK on May 14, 1993, and Bertsch filed its protest in our Office on May 21.

Bertsch contends that GSA improperly awarded LK a lease for a building with only 11,553 square feet of office and related space in spite of the SFO's required minimum of 12,070 square feet. Bertsch also contends that it measured the wareyard offered by LK and found that it is less than the 28,800 square feet required by the SFO.

GSA reports that when it first leased the building for use by the USGS 15 years ago, it measured the building and determined that there were 12,070 square feet of office and related space.<sup>4</sup> However, since the SFO preceding that award solicited offers for a maximum of 11,553 square feet, that number was incorporated into the original lease so that the government would not have to pay for more than the maximum footage requested. The agency states that LK used the original lease's figure in its proposal for the follow-on lease and intends to use this figure until it and the government jointly measure the building. In addition, a GSA realty specialist measured the blueprints of the building and determined that the blueprints show the proposed area actually contains 12,348 square feet of office and related space.

GSA did not measure the wareyard after LK submitted its proposal. GSA has provided a document showing that it measured the wareyard upon obtaining additional space for USGS in 1979 and found that the property had 28,800 square feet of parking or wareyard space. GSA points out that USGS has been using the offices and wareyard offered by LK for 15 years and that the property has always met and continues to meet the tenant's wareyard needs.

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<sup>3</sup>Bertsch is not protesting the contracting officer's decision to reject its offer but, as noted above, argues that LK's offer is also unacceptable and, therefore, reopening of the competition is warranted since there were no acceptable offers.

<sup>4</sup>LK bought the building sometime during the original lease's 15-year term.

In our opinion, GSA properly found that LK's building met the SFO's minimum space requirements. GSA's explanation for why it believes LK's building actually has more than 12,070 square feet of usable office and related space even though LK's offer stated that the building has only 11,553 square feet of office and related space is reasonable. Furthermore, even assuming the building only has 11,553 square feet of office and related space, GSA reasonably determined that LK's proposed space met the SFO's requirement, since the SFO specifically stated that the minimum footages for office and related space and the wareyard were "approximate." Regardless of which figure represents the actual footage, as the difference between 11,533 and 12,070 square feet is less than 5 percent, GSA reasonably determined that approximately 12,070 square feet had been offered. The protester has provided no evidence that LK's property contains less space than required and the protester has not suggested that the property was altered in any way that would reduce the size of either the office or wareyard since they were measured by GSA. Accordingly, we have no basis for finding that GSA's determination that LK's offer met the SFO space requirements was unreasonable.

Bertsch next contends that LK's offer should have been rejected because it included inaccurate certifications. The protester states that LK falsely completed the SFO's "Contingent Fee Representation" clause (certifying that it had not paid any person or company a contingent fee or commission to obtain this lease) and "Asbestos Representation" clause (certifying that the building does not contain asbestos). Bertsch points out that LK's manager, rather than the firm's owners, was responsible for determining the proposed prices. Bertsch therefore concludes that LK incorrectly certified that no fee had been paid to any individual to obtain this contract. The protester also alleges that the building offered by LK is old and must contain asbestos, and, therefore, LK incorrectly certified that the building does not contain asbestos.

The purpose of the contingent fee prohibition is to prevent the use of improper influence by third parties over the federal procurement system. General Sales Agency, B-247133.2, June 29, 1992, 92-1 CPD ¶ 544. The prohibition only applies to situations where a selling agent agrees to solicit or obtain a contract from the procuring agency. Id. There is an exception to the prohibition for bona fide employees of the contractor, who neither exert nor propose to exert improper influence to obtain government contracts. Id.

The proposal submitted by LK designates LK's manager as a bona fide employee of the firm who is specifically authorized to determine the firm's proposed prices in competing for this lease. Bertsch does not offer any reason to question the employee's status or LK's certification. In addition, Bertsch's charge that the building must contain asbestos due to its age is not supported by any evidence and appears to be mere speculation on the protester's part. See Creative Medical Management, Inc., B-236266.2, Aug. 15, 1989, 89-2 CPD ¶ 143; Holsman Servs. Corp., B-230248, May 20, 1988, 88-1 CPD ¶ 484. Accordingly, the allegation that LK has submitted false certifications provides no basis for sustaining the protest.

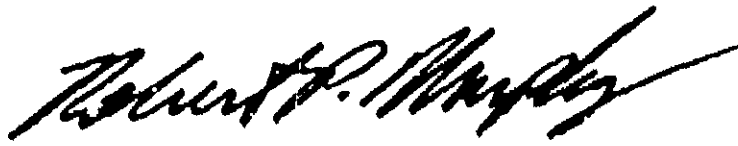
Bertsch also asserts that the lease was improperly awarded to LK because it should, but does not, include any requirement that the wareyard be resurfaced. The agency responds and our review of the solicitation confirms that the SFO did not require that the wareyard be resurfaced.

In its initial protest, the protester alleged that negotiations were unbalanced. In comments on the agency's report, Bertsch explained for the first time that it believes the negotiations were improper because, in its requests for BAFOs, GSA asked LK to consider reducing its rental rate but did not make the same request of Bertsch. Since Bertsch apparently knew this basis for protest when it filed its initial protest but waited until it filed its comments more than 10 days later to file a detailed statement, the issue is untimely. 4 C.F.R. § 21.2(a)(2) (1993). In any event, an agency properly may inform an offeror that its costs are considered to be too high or unrealistic, cf. Federal Acquisition Regulation § 15.610(d)(3)(ii); see also Associated Chemical and Envtl. Servs., et al., 67 Comp. Gen. 314 (1988), 88-1 CPD ¶ 248, and the extent of discussions held with competing offerors properly may vary depending upon the specific concerns an agency has with proposals. See Holmes & Narver, Inc., B-239469.2; B-239469.3, Sept. 14, 1990, 90-2 CPD ¶ 210. Here, the record shows that LK only lowered its rental rate by 0.1 cent--from \$10.56 to \$10.55 per square foot. In view of the fact that Bertsch's offer was found to be unacceptable, we cannot see how Bertsch suffered any competitive prejudice, an essential element of a successful protest. See Tampa Shipyards, Inc., B-231802, Sept. 30, 1988, 88-2 CPD ¶ 304.

Finally, the protester alleges that the agency's present value analysis was faulty because the calculations were based upon Bertsch's initial proposal rather than its BAFO rent. However, the record shows that GSA did use Bertsch's BAFO rate in performing the present value analysis. Bertsch's proposal had already been determined to be

incomplete and unacceptable, and GSA reports that a present value analysis of Bertsch's offer was done "solely for informational purposes." As Bertsch could not be awarded the lease on the basis of its incomplete and unacceptable proposal, the present value analysis had no effect on Bertsch's standing in the competition, because a contracting agency is not required to consider even a lower cost proposal in its award decision where the proposal is technically unacceptable. See Elsinore Aerospace Servs., Inc., B-239672.6, Apr. 12, 1991, 91-1 CPD ¶ 368. Therefore, this portion of the protest is denied.

The protest is denied.

  
for James F. Hinchman  
General Counsel